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Montana Reserved Water Rights Compact Commission Response to NMAR's White Paper of September 23, 2010

The Montana Reserved Water Rights Compact Commission (Commission) appreciates the attention the Northwest Montana Association of Realtors (NMAR) has paid to our ongoing negotiations with the Confederated Salish and Kootenai Tribes (CSKT or the Tribes) concerning the Tribes' water rights claims. It is precisely because of that sustained attention, however, that the Commission was distressed by NMAR's White Paper of September 23, 2010. The White Paper is rife with inaccuracies and distortions and reflects a fundamental misunderstanding of the compact process and the Commission's role in compact negotiations. The Commission offers this response in order to correct those misperceptions.

I. The Preamble

The section of the White Paper titled "Preamble" evinces some misunderstandings of what has occurred in the negotiations to date. At the outset, the White Paper asserts that "the [Commission] unilaterally moved the claim date of the Flathead Irrigation Project (FIIP) water rights from 1908 to 1855." The Commission has not changed, and lacks the authority to change, FIIP's priority date. Any final determination of FIIP's priority date can only be made by the Montana Water Court, which is the entity possessing sole jurisdiction to decree all water rights in Montana (including those that would be quantified in a CSKT-Montana water rights compact). It is certainly not something the Commission could accomplish "unilaterally."

The question of how FIIP's water right will be balanced against the Tribes' non-consumptive claims is a critical issue for a successful settlement, and one that has been discussed repeatedly at our negotiating sessions with the Tribes. The Tribes and the Flathead Joint Board of Control (FJBC) are currently engaged in discussions in an attempt to reach common ground as to administration of FIIP's rights once a settlement is reached. One component of those discussions includes considering FIIP's rights to have the same priority date as the Tribes' other consumptive rights – July 16, 1855, the date of the execution of the Hellgate Treaty. Such treatment would be consistent with how Bureau of Indian Affairs irrigation projects (of which FIIP is one) have been treated in other Indian water rights settlements in Montana. The Commission believes there is a strong legal justification for doing so.

The Commission is aware that its mission includes a responsibility to protect *all* existing water users to the greatest extent possible, and the Tribes have committed to protecting *all* existing verified uses. While the Commission continues to negotiate over exactly what such

protections entail, it is inconceivable that the Commission would support any settlement that includes provisions that could threaten people's access to adequate water for domestic uses. It is equally unlikely that the Montana Legislature–which must ultimately approve any settlement (along with the United States Congress, the Tribes and the Water Court) before it can take legal effect – would ratify a settlement that curtailed access to water for domestic uses. Given the hydrology of the basin, moreover, there is no practical likelihood of adverse effect to any existing water right holders on or off the Reservation should FIIP's priority date be adjudicated as 1855 instead of the 1909 date originally filed for by the Bureau of Indian Affairs and the FJBC. There is no legal possibility of state-based water rights on the Reservation with a pre-1909 priority date in any event, as the Reservation was closed to non-Indian settlement until May of 1909.

The Preamble also reflects confusion regarding the status of the Water Management Board (Board) described in the Draft Unitary Administrative and Management Ordinance (11/10/08). The Board is under discussion as a possible administrative entity responsible for the administration and enforcement of all water rights on the Flathead Indian Reservation (FIR or Reservation). The Board would come into existence only after a settlement is adopted. The rules that would govern the Board's administrative and enforcement duties have been provisionally termed the "Law of Administration." The Preamble asserts that "[t]hroughout the [Commission] negotiations, the 'Law of Administration' has remained undefined yet it governs how the newly constructed Water Board will administer water rights, conservations, fines and fees."

The White Paper is correct that the "Law of Administration" is still a work in progress. The entire settlement – including the status and composition of a possible Water Management Board – is still a work in progress. There is not, despite the White Paper's implication to the contrary, a Water Management Board currently in existence and operating under yet-to-be-defined rules. The Commission and Tribes continue to explore the status and role of the Board and to work to develop a body of rules (to be codified in both state and tribal law as part of the legal rules governing a comprehensive settlement) to govern any such Board's operation. The Commission has released working drafts of both the administrative provisions of a possible Compact and of a potential Law of Administration in order to obtain feedback from both the negotiators and the public. These drafts have been, and will continue to be "negotiated with the State of Montana open meetings laws in mind".

Another significant error in the Preamble is the assertion that the possible composition of the Board, as described in the draft documents, "could allow for an all Tribal Water Board, without proper representation for non-tribal members." The Board, as contemplated by the draft documents, would consist of five members, two appointed by the Tribes, two by the Governor of the State of Montana, and a fifth member selected in some fashion by the appointed four. A quorum of four members would be required, moreover, before the Board could conduct any business. With these provisions in place, we do not foresee a scenario under which Board decisions could be made exclusively by tribal appointees "without proper representation for non-tribal members."

The Preamble also expresses concern that the Commission is "not establishing a baseline quantity of water that is available for consumptive and non-consumptive use in the Flathead Basin[.]" As a threshold matter, the notion of a "baseline" quantity of water oversimplifies the variability of water resources from season-to-season and year-to-year. Contrary to the White Paper's implication, there is not one single number that could be produced to answer the question of how much water is "available." This hydrologic complexity notwithstanding, the Commission and DNRC's Water Resources Division staff has devoted significant time and resources to examining actual water uses on the FIR; how those uses can be protected while simultaneously quantifying a significant senior tribal right that has both consumptive and non-consumptive dimensions; and also to the evaluation of the interaction of on-reservation uses with up- and down-stream uses off the Reservation.

Technical staff from the Commission, the Tribes, and the United States have worked both collaboratively and independently to develop a comprehensive picture of water supply and demand. The parties have discussed this effort repeatedly at our negotiating sessions. This effort has entailed analyzing:

- DNRC claims and permit databases;
- information supplied by the Tribes from their own technical work–including stream flow gauging data and diversion and flow information from the HYDROSS model developed by the Tribes' technical consultant Dowl-HKM Engineering;
- Flow and delivery records from FIIP and the FJBC;
- Data from the Montana Bureau of Mines and Geology's Ground Water Information Center (GWIC); and
- Data from the United States Geological Survey;
- Geographic Information System products assembled by Commission staff utilizing some or all of the aforementioned sources.

The parties have also initiated the preparation of additional tools, such as an application to lands on the Reservation of the METRIC methodology developed by the University of Idaho for measuring the actual water consumption of crops and other vegetation, to augment our understanding of these issues. We strongly agree with the White Paper's suggestion that a solid understanding of the water situation on the Reservation and throughout the Flathead Basin is critical to a successful settlement. The White Paper is in error in asserting that we have not been working to achieve that understanding.

The Preamble is also inaccurate in its claim that the Tribes are "not disclosing the amount of water that they are currently using." The Tribes have shared with the Commission the available information on current uses. However, one of the challenges in negotiation settlements of federal reserved water rights claims is that *use* alone is not the extent of the claimant's rights.

II. The History Section

It is incorrect to say (as the White Paper does) that the Hellgate Treaty "created the Confederated Salish and Kootenai Tribes of the Flathead Reservation." Rather, the treaty recognized the Tribes' cession of certain lands from their broader aboriginal territory and the

Tribes' reservation (in the sense of "keeping back") from that cession the lands that became the FIR. Certainly, many of the Tribes' water rights claims stem from the Hellgate Treaty.

The White Paper's characterization of Winters v. United States and Arizona v. California, and its recital of the history of Montana Water Rights, are oversimplifications at best. Winters did establish the doctrine of federal reserved water rights, but it did not *limit* to irrigation purposes the water to which a tribe might be entitled. See, e.g., United States v. Adair, 723 F.2d 1394, 1411 (9th Cir. 1983), cert. denied sub nom. Oregon v. United States, 467 U.S. 1252 (1984) (instream reserved rights for fisheries). Practically Irrigable Acreage (PIA) has been the standard most frequently referenced in tribal quantifications, because it generally leads to the largest possible right for a tribe and because most reservations east of the mountains were established with the objective of assisting the tribes in establishing an agrarian lifestyle. Other approaches have been used, however, to reflect the particular circumstances of a tribe and the context in which a quantification of the tribal right was achieved. In any event, the White Paper correctly recognizes that achieving a quantification of the Tribes' water rights is an important component of the completion of Montana's general stream adjudication.

III. Issues of Concern

The White Paper divides this section into five subsections, each of which is addressed in turn below.

A. Quantifying Tribal Water Rights

The White Paper declares that discussion of the Water Management Board reflects a shift in the "premise of the compact" from quantification to water management. This statement is wrong. The Commission's core statutory task is to negotiate a quantification of the Tribes' water rights that can be included in Montana's general stream adjudication. *See* § 85-2-701, MCA. In doing so, however, the Compact Commission strives to protect existing users to the greatest extent possible. In achieving this goal, the Compact Commission has often found a focus on the administration of tribal and state-law based water rights to be a useful tool in crafting settlements. That is particularly true on the FIR. By dealing with quantification and administration (which necessitates management) in tandem, the Commission believes that a settlement can be crafted that simultaneously recognizes the significant water rights of the Tribes and keeps existing water users materially whole. Conversely, without focusing on management it is practically impossible to protect existing and future non-tribal uses.

The White Paper next repeats the assertion that the Tribes must reveal "the amount of water that they currently use" and also "the number of wells that have been drilled since 1996." The first statement has already been addressed in the "Preamble" section of this Response. As to the latter demand, the Tribes have shared information on the 140 or so wells they have recognized since 1996, but the legal relevance of tribal recognition is questionable. The Ciotti line of cases (the first of which was decided in 1996) divested the DNRC of permitting jurisdiction on the Reservation prior to a final quantification of the Tribes' water rights, but it did not insert the CSKT as the regulator. Rather, the cases left a regulatory vacuum, leaving new wells to be drilled in an uncertain legal environment. Beyond the wells they specifically were

asked and consented to recognize, the Tribes have no special access to information about post-1996 wells.

Coordinating with the DNRC, the Commission has determined that roughly 730 wells were drilled after 1996 for which the landowner filed a notice of completion with the DNRC (which the DNRC was precluded from processing as a result of the Ciotti decisions). By combing through the GWIC database, Commission staff identified approximately 1000 additional wells drilled after 1996 for which the well driller filed a well log with the Montana Bureau of Mines and Geology, but for which the landowner did not file a certificate of completion or permit application. It is likely that there are additional wells for which neither the well driller nor the landowner submitted information that would allow to the ready identification of the location or size of a well. The parties nevertheless intend to create through the negotiations a process to allow for all of these post-1996 wells (whether presently identified or not) to receive legal protection in the post-settlement world. Significantly, litigation of the Tribes' reserved rights claim could not provide a solution to the problem posed by these non-documented wells. And, as noted above, the Commission does not believe that a settlement that fails to allow de minimis domestic appropriations would be either desirable or politically viable.

The White Paper also takes issue with the notion of "aboriginal" water rights and reference to the term "time immemorial," preferring instead "a specific start date" because "otherwise the Tribe [sic] will always be 'first in time, first in right.'" Both "aboriginal" and "time immemorial" are legal terms with particular significance as they apply to the Tribes' claims for the water necessary to sustain the hunting and fishing and fishing rights the Tribes retained through the Hellgate Treaty. See, e.g., Adair, 723 F.2d at 1414. The Tribes' historic occupancy of the lands on and around the FIR, when compared with the dates of non-Indian settlement of Montana, render the Tribes' claims first in time and first in right under Montana's prior appropriation system. That fact poses one of the particular challenges of these negotiations – the need to find a way to recognize the Tribes' senior water rights while protecting existing users.

B. Water Management Board

This section repeats the far-fetched contention discussed above that the proposed Water Management Board could be controlled entirely by the Tribes. It also questions the existence of "checks and balances" on the Board's powers. The parties recognize the need for oversight and cabining of the Board's authority. The parties contemplate two mechanisms by which to impose such limitations. The most critical check on the Board's power is the codification – into both State and Tribal law – of the rules that govern its operations and decision-making. The draft Law of Administration reflects an initial attempt to articulate these rules, though that document is very much a work in progress. The parties recognize that they will not reach a settlement unless and until they can arrive at a politically acceptable set of rules and procedures to govern the Board's operation and the exercise of whatever powers are ultimately conferred upon it. Judicial review will also be an available means of relief for any party injured by the Board's decision

C. Open Meeting Laws

This section reflects a misunderstanding of both the negotiating process and Montana's open meeting laws. Contrary to the White Paper's contention that "the real negotiations…have been held in closed door sessions[,]" all of the Commission's negotiations are held in open, noticed public meetings. However, we have made no secret of the fact that significant legal and technical work is being done at a staff level, work that is critical to informing the negotiators regarding issues that must be addressed as we negotiate a final settlement. No individual member of the staff has any authority to bind his or her principals, or to commit any of the sovereigns at the negotiating table, to any position. Consequently, these staff-level gatherings are not the sort of assembly covered by Montana's open meeting laws. SJL Assocs. Ltd. Partnership v. City of Billings, 263 Mont. 142, 867 P.2d 1084 (1993) (meeting between individual city staff members and building company managers not a public meeting). Moreover, the sorts of "decisions" that the White Paper attributes to being made at such staff-level meetings are issues that, in fact, have not yet been decided. Rather, they remain subject to negotiation. The staff work assists the negotiations by providing information which is routinely reported on at our negotiating sessions.

D. Law of Administration

This section largely repeats issues raised in prior sections of the White Paper concerning the powers of the Water Management Board. It is likewise animated by a misunderstanding of how the proposed Board will be empowered, and what rules it will apply. As a clear example, this section claims that "[t]he Board will not be governed by state law[.]" As discussed above, this is simply wrong. Nevertheless, we are very sensitive to the concern underlying this section, namely that a post-settlement administrative scheme needs to ensure that both Indians and non-Indians are treated fairly. The Commission cannot imagine that the Legislature would approve a settlement without such provisions.

E. Off-Reservation Water Rights Issues

This section seems to be driven by the understandable concern about how the quantification of the Tribes' water rights will affect the availability of water for future development in the Flathead Basin off the FIR. The White Paper errs, however, by describing the subject of our negotiations as concerning "new water rights that will be given to the CSKT[.]" As explained above, the Tribes' rights are in fact *old* rights – with a priority date of no later than 1855 and possibly much earlier (time immemorial) for non-consumptive aboriginal rights. Our negotiations are not about "giving" the Tribes rights, but rather trying to achieve a reasonable quantification of their *existing* rights in a manner that is consistent with the protection of non-tribal users to the greatest extent possible.

The White Paper is also incorrect when it asserts that the impacts of an 1855 priority date for FIIP on off-Reservation water users "have been ignored." Commission staff has examined the historic use of FIIP's right and have found that–as noted above–the hydrologic conditions of the basin are such that there is no practical likelihood of any existing water user suffering any adverse effect from a determination by the Water Court that FIIP's priority date is 1855.

It is true, however, that the legal availability of water for future development in the Flathead Basin is very much in question, particularly in light of PPL Montana's recent amendment of its water right claims for Kerr Dam and its associated storage in Flathead Lake. In the event that it is determined (whether through administrative, judicial or legislative action) that the Flathead Basin is closed to new appropriations, it is likely, consistent with Montana law, that the development of new water uses would need to be accomplished either through changes of existing water rights or with mitigation water. This state of affairs was not created by the compact negotiations. It exists regardless of how the Tribes' water rights are ultimately quantified. It is simply a fact of life for western Montana.

F. Conclusion

The Commission shares the White Paper's concern about the "limbo" status of wells drilled on the FIR since 1996. As discussed above, the Commission is confident that this issue will be resolved through the settlement process. The White Paper asserts that three tasks must be "completed" before settlement negotiations should proceed further: the "[q]uantification of all water in the Flathead Basin[;]" the quantification and "disclos[ure] to the public" of "all water usage/rights" of the Tribes, non-Indians, off-Reservation water users and FIIP; and the "[q]uantification of agricultural land on the reservation." Waiting for these things would have the perverse effect of extending this limbo state into the indefinite future, and would, in addition, grossly exceed the scope of the Commission's authority.

The "[q]uantification of all water in the Flathead Basin" is the task of the Montana Water Court through the adjudication. *See* §§85-2-212 *et seq.* The Commission's job is to negotiate quantification agreements for existing rights that can be decreed in the adjudication. §85-2-701, MCA. As discussed above, Commission staff has spent and continues to spend considerable time and resources to develop as comprehensive a picture as possible of all existing water uses on the FIR to assist the Commission in the negotiations. But the final quantification of all uses can only be accomplished by the Water Court--for rights pre-dating July 1, 1973--or by the DNRC through the administrative process for the issuance of post-1973 water rights.

The Commission has significant disagreements with many of the statements and positions expressed by NMAR in its White Paper. The Commission nonetheless values NMAR's attention to our negotiations. Commission staff remains willing to answer any questions that NMAR or its members might have about the details of the legal and technical work that is being done to assist the settlement process. The Commission welcomes NMAR's invitation to meet, and looks forward to calendaring that meeting at the earliest possible date. The Commission believes that full and frank conversations between the Commission and NMAR can help all of the parties as we move ahead with these water rights negotiations.